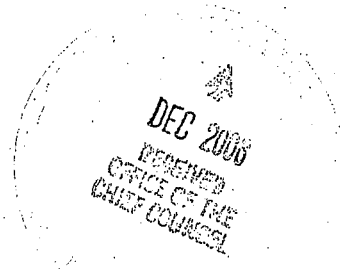
CAROLYN BARNES
CITY OF BURBANK
Office of the City Attorney
275 East Olive Avenue
Burbank, California 91510-6459
Telephone: (818) 238-5700
Facsimile: (818) 238-5724

Counsel for Petitioner
CITY OF BURBANK

DOWNEY BRAND LLP
MELISSA A. THORME
NICOLE E. GRANQUIST
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686
Telephone: (916) 444-1000
Facsimile: (916) 444-2100

Special Counsel for Petitioner
CITY OF BURBANK

ORIGINAL



DOWNEY BRAND LLP

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the City of Burbank's Petition for Review of Action and Failure to Act by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting NPDES Permit No. CA0055531, Order No. R4-2006-0085 for the City of Burbank Water Reclamation Plant.	**PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW; and REQUEST FOR EVIDENTIARY HEARING.** **[WATER CODE §§13320]**

In accordance with section 13320 of the Water Code, Petitioner City of Burbank ("City") hereby petitions the State Water Resources Control Board ("State Board") to review the action and failure to act by the California Regional Water Quality Control Board for the Los Angeles Region ("Regional Board") in issuing NPDES Permit No. CA0055531, Order No. R4-2006-0085, ("Permit") on November 9, 2006. A copy of the Permit is attached hereto as Exhibit A, and a copy of the November 9, 2006 hearing transcript is attached hereto as Exhibit B.

A summary of the basis for the City's Petition and a preliminary statement of points and authorities are set forth in this Petition for Review in accordance with Title 23, California Code of Regulations ("CCR") section 2050(a). The City reserves the right to file supplemental points and authorities in support of the City's Petition for Review once the full administrative record becomes available. The City also reserves the right to submit additional arguments and evidence responsive to the Regional Board's or other interested parties' responses to the City's Petition for Review, to be filed in accordance with 23 C.C.R. §2050.5.

1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF THE PETITIONER:

City of Burbank
Public Works Department
Attn: Bonnie Teaford and Rodney Andersen
275 East Olive Avenue
Burbank, California 91510-6459
Telephone: (818) 238-3931
Email: bteaford@ci.burbank.ca.us and randersen@ci.burbank.ca.us

However, all materials in connection with this Petition for Review should also be provided to the City's counsel at the following addresses:

Carolyn Barnes
City of Burbank
Office of the City Attorney
275 East Olive Avenue
Burbank, California 91510-6459
Telephone: (818) 238-5700
email: CBarnes@ci.burbank.ca.us

Melissa A. Thorme
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, California 95814
Telephone: (916) 444-1000
Email: mthorme@downeybrand.com

2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

The City seeks review of the Regional Board's action and failure to act in connection with the issuance of the Permit. In issuing the Permit, the Regional Board failed to comply with the

express provisions of federal regulations and the Water Code, failed to act reasonably as required by Water Code section 13000, failed to support the provisions of the Permit with proper findings, and included findings and requirements in the Permit not adequately supported by evidence in the administrative record.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:

The Regional Board issued the Permit on November 9, 2006.

4. A FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

This case involves the Regional Board's issuance of an NPDES permit that improperly imposes effluent limitations in conflict with federal and state law, and includes provisions related to sanitary sewer overflows that are unnecessarily duplicative, inconsistent with, or more stringent than, the Statewide General Waste Discharge Requirements for Sanitary Sewer Systems, State Water Resources Control Board, Order No. 2006-0003 ("General SSO WDR"). As more fully set forth in Section 7 below, the City is contesting the following provisions:

(1) The Permit contains duplicative, inconsistent, or more stringent provisions regarding Sanitary Sewer Overflows ("SSOs") than prescribed by the General SSO WDR, without including any specific findings or evidence that such duplicative, inconsistent, or more stringent provisions are necessary to protect local water quality. *See* Permit at Requirements and Provisions Sections IV.G.1. and IV.I.-K. For these reasons, the City requests the State Board to remove Requirements and Provisions Sections IV.G.1. and IV.I.-K. from the Permit and, instead, reference that the City will manage, monitor, and report issues related to its collection system in accordance with the General SSO WDR, as has been done in NPDES permits issued by the San Francisco Bay Regional Water Quality Control Board (*see e.g.,* Order No. R2-2006-0068 at footnote 4) and by other regional boards, and be subject to the standard provisions related to SSOs.

(2) The Permit includes effluent limitations based on Title 22 standards ostensibly to protect the groundwater aquifer underlying the Los Angeles River. *See* Permit at Discharge Requirements Section I. A.2, 6, and 8. However, clear evidence presented by the City that the Los Angeles River does not normally recharge the underlying groundwater aquifer was disregarded by

the Regional Board and that the constituents being regulated in the permit were not present in the groundwater at levels to cause any concern justifying regulation. The evidence presented by the City indicates the groundwater is an upwelling zone and a gaining reach, such that treated water discharged by the City does not ultimately infiltrate into the groundwater aquifer[1] () and will not adversely affect any MUN beneficial use of the groundwater. Thus, the Regional Board failed to support imposition of the Title 22 MCL-based effluent limitations with findings supported by evidence in the administrative record.

(3) The Permit includes effluent limitations where no "reasonable potential" analysis was conducted, and/or where no findings or findings based on evidence in the administrative record justifies a finding of reasonable potential. *See* Permit at Discharge Requirements Section I.A.2(a) and (b), 6., and 8.

(4) The Permit includes daily maximum effluent limitations, in addition to monthly average effluent limitations for the same constituent, in conflict with 40 C.F.R. section 122.45(d)(2) and Water Code section 13000, since no findings, or no findings supported by evidence in the administrative record, indicate the impracticability of protecting water quality with only monthly and/or weekly average limitations. *See* Permit at Discharge Requirements Section I.A.2, 6 and 8 (to the extent these require daily limits).

(5) The Permit includes provisions not supported with proper findings, and/or findings and requirements in the Permit not adequately supported by evidence in the administrative record.

(6) The Permit includes provisions more stringent than required by federal water quality laws (*e.g.*, the Clean Water Act and its implementing regulations), such as daily limits for conventional and other pollutants, mass limits in addition to concentration limits, and Title 22-based limits, without the requisite analysis mandated under Water Code section 13263, including

---

[1] Regional Board staff for the first time at the hearing raised the issue of mixing of river water and ground water. It is the City's understanding from reports reviewed that if river water mixes, it is only with the very top portion of the aquifer, and instead of recharging the aquifer, that mixed groundwater resurfaces in the Los Angeles River. (*See* City of Los Angeles Bureau of Sanitation *"Report of the Potential Infiltration of Chlorides from the Los Angeles River Narrows into the Groundwater Aquifer"* January 1993, developed in Cooperation with the Upper Los Angeles River Area (ULARA) Watermaster:

the factors set forth in Water Code section 13241. *See City of Burbank v. SWRCB,* 35 Cal. 4th 613 (2005).

(7) The Permit requires excessive and unnecessary monitoring requirements, including groundwater monitoring that was originally included when the Regional Board was proposing groundwater limits. After removal of the groundwater receiving water limits, the monitoring for those limits should have been removed, but was not.

(8) The Permit contains inconsistent and unreasonable findings and provisions, including those related to Industrial Storm Water regulation, and is missing applicable footnote references.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

The City discharges tertiary-treated, disinfected water from the Burbank Water Reclamation Plant (WRP) to the Burbank Western Channel, which flows to the concrete-lined Los Angeles River. The discharge is currently regulated under NPDES permit/WDRs Order No. 98-052, adopted by the Regional Board on June 29, 1998.

The previous City permit and the accompanying Time Schedule Order were appealed by the City in July of 1998 and have been in litigation since the end of 1999. The result of the litigation was a 2001 Superior Court ruling that, *inter alia*, overturned the challenged requirements based on specification of the manner of compliance, improperly imposed daily maximum limits, and failure to explain or support the requirements in the administrative record.[2]

Other portions of the decision were appealed and overturned in an unpublished appellate decision, which was subsequently reviewed by the California Supreme Court. The Supreme Court remanded the case to the trial court to determine whether any of the requirements of the permit were more stringent than federal law. On June 28, 2006, the Superior Court ruled that eleven effluent limitations were more stringent than required by federal law. A return to the Superior

---

[2] *See e.g., City of Burbank,* 35 Cal. 4th at 623, n6 ("Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.")

Court is due on this permit before December 31, 2006 for the judge to determine if the Regional Board has complied with the Court's orders.

Under the new permit, the City will have to undertake very costly facility upgrades if source controls, site specific studies, or other measures are not approved within the timeframes set forth within the compliance schedules in the permit. *See Exhibit B,* Hearing Transcript at pgs. 126-127. These upgrades would be in addition to the over $26 million in extensive recent upgrades completed by the City without a regulatory mandate to do so. *Id.* at 25-26. Furthermore, the Regional Board's issuance of the Permit with unreasonable and potentially unattainable limits may expose the City to unnecessary civil and/or criminal penalties, and third party citizen suits. Alternative regulatory actions could have been taken (*e.g.,* alternatives to numeric effluent limits under 40 C.F.R. §122.44(k)(3)), but were rejected without meaningful review. Finally, the City is required to expend a great deal of additional resources (*e.g.,* more than $1,000,000 over the life of the permit in additional cost) on monitoring that has not been adequately justified as necessary or proportionate to the benefits to be received. *Id.* at pg. 123. Each of these represent independent reasons why the City is aggrieved.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS:

The City seeks an Order by the State Water Resources Control Board ("State Board") that invalidates and removes the contested provisions of the Permit, or, alternatively, remands the Permit to the Regional Board to modify the Permit as directed by the State Board, consistent with the arguments stated in Section 7 of this Petition.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

A. <u>Planning, Monitoring, and Reporting Provisions For Sanitary Sewer Overflows Impermissibly Conflict With, and Are More Stringent Than, the General SSO WDR and State Policy, and Are Unsupported By Findings or Evidence.</u>

The Permit requires the City to maintain a "Spill Contingency Plan" ("SCP") and to comply with "Spill Reporting Requirements," requiring the City to develop and maintain records

of spills, overflows or bypasses from the City's collection system. *See* Permit at Requirements and Provisions Sections IV.G.1. and IV.I.-K. These provisions prescribe very detailed requirements that are redundant, inconsistent with, or more stringent, than the General SSO WDR that is also applicable to the City.[3] Furthermore, the Regional Board failed to justify the inclusion of these inconsistent or more stringent provisions with findings supported by evidence in the administrative record. For these reasons, the City requests the State Board to remove Requirements and Provisions Sections IV.G.1. and IV.I.-K. from the Permit, and instead, reference that the City will manage, monitor, and report issues related to its collection system in accordance with the General SSO WDR, as has been done in NPDES permits issued by the San Francisco Bay Regional Water Quality Control Board and other regional boards.[4]

The SCP and the Spill Reporting Requirements at issue here unnecessarily duplicate, conflict, and are more stringent than, the planning, monitoring, and reporting provisions set forth in the General SSO WDR, with which the City must also comply. For example, Spill Reporting Requirements at Requirements and Provisions Sections IV.I.2.b., d., and e. are excessive,[5] and not consistent with the General SSO WDRs, which require reporting in the online database within

---

[3] The City was required to, and did, enroll for coverage under the General SSO WDRs by November 2, 2006.

[4] Recent NPDES permits issued by the San Francisco Bay Regional Water Quality Control Board include the following language (*see, e.g.,* Order NO. R2-2006-0068): "Sanitary Sewer Overflows and Sewer System Management Plan. The Discharger's collection system is part of the facility that is subject to this Order. As such, the Discharger must properly operate and maintain its collection system (Attachment D, Standard Provisions – Permit Compliance, subsection I.D.). The Discharger must report any noncompliance (Attachment D, Standard Provision – Reporting, subsections V.E.I., and V.E.2.), and mitigate any discharge from the Discharger's collection system in violation of this Order (Attachment D, Standard Provisions – Permit Compliance, subsection I.C.). The General Waste Discharge Requirements for Collection System Agencies (Order No. 2006-0003 DWQ) has requirements for operation and maintenance of collection systems and for reporting and mitigating sanitary sewer overflows. <u>While the Discharger must comply with both the General Waste Discharge Requirements for Collection System Agencies (General Collection System WDR) and this Order, the General Collection System WDR more clearly and specifically stipulates requirements for operation and maintenance and for reporting and mitigating sanitary sewer overflows. Implementation of the General Collection System WDR requirements for proper operation and maintenance and mitigation of spills will satisfy the corresponding federal NPDES requirements specified in this Order. Following reporting requirements in the General Collection System WDR will satisfy NPDES reporting requirements for sewage spills. Compliance with these requirements will also satisfy the federal NPDES requirements specified in this Order</u>." (emphasis added).

[5] The requirements are also vague. For example, Section IV.I.e. requires that grab samples be taken from an overflow of 1000 gallons or more for bacteria and "relevant pollutants of concern." This requirement is unclear, and indication from Regional Board staff is that they may interpret this to mean all pollutants required to be regularly monitored. If that is the interpretation, there are substantial costs associated, yet it is not clear that meaningful information would be gathered or that cleanup activities would be altered in any way due to that information.

three days of becoming aware of an SSO, and the General SSO WDR does not require the additional sampling and analyses imposed. The requirements at Sections IV.I.a. and c. merely restate requirements from the Health and Safety Code and Water Code, which by way of incorporation herein become federally enforceable state law requirements. Furthermore, the imposition of a SCP at Requirements and Provisions Sections IV.G.1., in addition to the General SSO WDRs' SSMP, is onerous and unnecessary, unless this were narrowed or interpreted to only apply to non-sewage spills (e.g., chlorine or other chemicals used onsite). While the General SSO WDR allows the Regional Board to implement more stringent requirements, as noted below, nothing in the General SSO WDRs allows the Regional Board to take an action that is entirely inconsistent with or conflicts with the General SSO WDRs, especially where no special justification is provided.

By way of background, on May 2, 2006, after a multi-year public process, the State Board adopted the General SSO WDR for the purpose of governing sanitary sewer systems consistently throughout the State. The State Board's intent in adopting the General WDRs was "to have one statewide regulatory mechanism that lays out the foundation for consistent collection system management requirements and SSO reporting." *See* General SSO WDR Fact Sheet at pg. 8. The State Board determined that "[i]n order to provide a consistent and effective SSO prevention program, as well as to develop reasonable expectations for collection system management, these General WDRs should the primary regulatory mechanism to regulate public collection systems." *Id.* Recent guidance from the State Board confirms that the General SSO WDR is the permit that should govern the City's collection system. In a November 8, 2006 Letter from Tom Howard at the State Board to all Regional Water Board Executive Officers, the State Board instructs the Regional Water Boards as follows:

> "When the WDRs or NPDES permits are revised or reissued, the Regional Water Boards should, in most cases, *remove the sanitary sewer system provisions in the existing WDRs or NPDES permits and rely on the Sanitary Sewer Order to regulate the sanitary sewer system.*"

See Nov. 8, 2006 Letter at pg. 4 (emphasis added).

If the State Board intended regional boards to continue to regulate sanitary sewer collection systems on an *ad hoc* basis, it could have simply issued guidance, policy, or regulation – none of which are self-implementing. Instead, the State Board opted to issue a permit (the General SSO WDRs) *and* require every public sanitary sewer system in the State to obtain coverage under that permit regardless of whether the system was part of a publicly owned treatment works regulated by a National Pollutant Discharge Elimination System ("NPDES") permit. If regional boards may simply layer additional or different requirements upon individual collection systems because the dischargers happen to be NPDES permit holders, the State Board's stated goal of consistent implementation will be severely undermined.

While the General SSO WDR recognizes there are "some instances when Regional Water Boards will *need* to impose more stringent or prescriptive requirements," the Regional Board in this case did not support the imposed SCP and Spill Reporting Requirements with findings or evidence demonstrating the *need* for the provisions. *See* General SSO WDR Fact Sheet at pg. 9 (emphasis added). Orders adopted by the Regional Board not supported by the findings, or findings not supported by the evidence, constitute an abuse of discretion. *Topanga Association for a Scenic Community v. County of Los Angeles,* 11 Cal.3d 506, 515; *California Edison v. SWRCB*, 116 Cal. App.3d 751, 761 (4th Dt. 1981); *see also In the Matter of the Petition of City and County of San Francisco, et al.,* State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995).

Furthermore, even if the Regional Board could justify the need to impose the contested provisions of the Permit, the Regional Board must follow the State Board's directive in the General SSO WDRs and adopt separate waste discharge requirements that supersedes the City's obligation to comply with the General SSO WDRs. In other words, a sanitary sewer system may be subject to a separate, more stringent permit, or to the General WDRs, but not both, and not an NPDES permit.

Nothing in the record supports a decision to impose different, more stringent requirements upon the City, thereby exposing the City to greater enforcement, penalties, and citizen suits than every other collection system in the state that will be regulated solely by the General WDRs. This difference in regulatory treatment has nothing to with any unique or exceptional aspect of the

City's collection system or compliance history. Rather, the City faces increased enforcement solely because it operates a treatment plant subject to regulation by an NPDES permit issued by the Los Angeles Regional Board. Thus, the imposition of Requirements and Provisions Sections IV.G.1. and IV.I.-K. in the Permit is arbitrary, capricious and not supported by findings in the Permit, or evidence in the record.

Finally, in adopting the Permit, the Regional Water Board also failed to abide by the Porter-Cologne's directive to be reasonable. Water Code section 13000 specifies that activities "which may affect the quality of the waters of the state shall be regulated to attain the *highest water quality which is reasonable* considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, *economic and social*, tangible and intangible." (Emphasis added.) The inclusion of Requirements and Provisions Sections IV.G.1. and IV.I.-K. runs afoul of the Regional Board's duty to act reasonably and to treat all similarly situated dischargers in a similar and equivalent manner.

B. <u>The Regional Board Improperly Imposed Effluent Limitations and Related Monitoring Requirements for The Sole Purpose of Protecting Upwelling Groundwater Underlying the Los Angeles River.</u>

The Regional Board included effluent limits for inorganic, organic and radioactive contaminants[6] in the Permit, derived from Maximum Contaminant Levels ("MCLs") specified in Title 22 of the California Code of Regulations ostensibly for the protection of the GWR beneficial use in the Los Angeles River and the MUN use in local groundwater. *See* Permit at Finding 29 and Discharge Requirements Section I.A. To justify the imposition of these effluent limits, the Regional Board stated,

> Sections of the Los Angeles River, downstream of the Burbank WRP discharge point, are designated as GWR.[7] The depth of groundwater below the Burbank WRP is approximately 100 feet below ground surface. Surface water from the Los Angeles River enters the San Fernando Valley

[6] These effluent limitations include all nitrogen constituents, arsenic, bis-2, iron, trihalomethanes, turbidity and radioactivity.

[7] Given that the Burbank Western Channel is NOT designated as GWR (*see* Basin Plan at pg. 2-12), the limits were not properly applied as end-of-pipe limits and, if anything, should have had a point of compliance at the confluence of the LA River that has this designation.

> and the Central Los Angeles Coastal Plain Groundwater Basins. Since ground water from these Basins is used to provide drinking water to people, Title 22-based limits are needed to protect that drinking water supply.[8] By limiting the contaminants in the Burbank WRP discharge, the amount of pollutants entering the surface waters and groundwater basins are correspondingly reduced ... For these reasons Title 22-based limits will remain in the NPDES permit.

See Permit at pg. 14, Finding 29. The City objects to the inclusion of these limits for the following reasons: 1) there is clear evidence ignored by the Regional Board that the Los Angeles River, unlike other watersheds with actual recharge areas and spreading grounds, does not actually recharge the underlying groundwater aquifer, but rather, the evidence indicates the groundwater is an upwelling zone and a gaining reach, such that treated water discharged by the City does not infiltrate into the groundwater aquifer and has not and will not adversely affect any MUN beneficial use of the groundwater; thus, the Regional Board failed to support imposition of the Title 22 MCL-based effluent limitations with findings supported by evidence in the administrative record; 2) the Basin Plan does not specify that MCLs are applicable to the GWR use or to surface water discharges that may recharge a ground water basin; rather, MCLs apply to drinking water purveyors "end of tap;" 3) the Regional Board failed to comply with Water Code §13263(a) when imposing every limit based on MCLs; and 4) the adoption and implementation of the chemical constituents narrative water quality objective for surface waters violates state and federal law.

For this reason, the City requests the State Board to remove all Title 22-based effluent limitations imposed to protect the GWR beneficial use and corresponding findings and requirements.[9]

---

[8] It should be noted that Title-22 based requirements enforceable by the Department of Health Services ("DHS") do apply to the potable water served from the groundwater. However, those requirements apply at the tap, not in the groundwater.

[9] The Permit currently requires the City to submit a "workplan for a proposed groundwater monitoring system" within 60 days of the effective date of the Permit. *See* Permit at Requirements and Provisions section IV.P. Since the original Title 22-based *receiving water* limitations were removed from the earlier tentative versions of the Permit in favor of Title 22-based *effluent* limitations, the requirement for a workplan to institute a groundwater monitoring system should be removed.

1. The Los Angeles River Does Not Recharge the Underlying Groundwater Aquifer, as the Underlying Groundwater is Upwelling; thus, the Regional Board Has No Basis, Or Findings Supported by Evidence, To Impose Title 22 Based Effluent Limitations To Protect a Non-Existent GWR Beneficial Use.

There is clear evidence presented and ignored by the Regional Board when imposing MCL-based effluent limits that the Los Angeles River does not actually recharge the underlying groundwater aquifer, but rather, the groundwater is an upwelling zone and a gaining reach, such that treated water discharged by the City does not infiltrate and remain in the groundwater, and will not adversely affect any MUN beneficial use of the groundwater. *See* Hearing Transcript at pgs. 29-30; *see also* Permit at pg. 7, Finding 17 ("It is believed that this reach of the Los Angeles River was not lined because of groundwater upwelling. At times when the groundwater table is high, groundwater rises and contributes flow to the Los Angeles River. It is believed that this reach of the Los Angeles River was not lined because of groundwater upwelling....").[10] The Regional Board failed to provide evidence of any actual groundwater recharge occurring that contains the City's treated water, or that any local groundwater exceeds the MCLs in question and, therefore, failed to justify maintenance of previously stayed and judicially overturned effluent limits. *See City of Burbank v. State Water Resources Control Board, et al.,* Los Angeles County Superior Court Case No. BS 0609060, Statement of Decision, April 4, 2001, at pgs. 11-12.

---

[10] In fact, the LA River Nutrient TMDL required Burbank to perform a study on the loading of nutrients from the groundwater due to this upwelling. It is contradictory and unreasonable to include effluent limitations based upon recharge in this reach where no finding of incidental recharge has been substantiated with evidence in the record. *See* Permit at pg. 7, para. 17 finding without corresponding evidence that "Groundwater recharge occurs incidentally, in these unlined areas of the Los Angeles River."

Available data, presented to the Regional Board in written comments, indicate that the Los Angeles River Narrows, particularly south of Los Feliz Blvd., is characterized by a high water table resulting in the discharge of groundwater to the river channel. The Los Angeles County Department of Public Works has confirmed that the area is characterized by high groundwater and that a concrete lining has not been constructed because a lining could be structurally damaged due to the high groundwater pressure in the Los Angeles River Narrows (Quezada, 1992). Other studies in the region confirm conditions of groundwater discharge into the Narrows based upon historic and contemporary data (Mann and Blevins, 1990, Blevins, 1992, and DWP, 1992). The San Fernando Basin flow model simulated rising groundwater in the Los Angeles River Narrows. The simulation was based upon known hydrogeological conditions, and known or estimated water balance components provided by the ULARA Watermaster. The flow model predicted rising groundwater values within the same order of magnitude as the calculated values. The model simulation predicted average rising groundwater of 5,057 acre-feet annually; the average reported by the ULARA Watermaster is 3,058 acre-feet annually (DWP, 1992). *See also* City of Los Angeles Bureau of Sanitation *"Report of the Potential Infiltration of Chlorides from the Los Angeles River Narrows into the Groundwater Aquifer"* January 1993, developed in Cooperation with the Upper Los Angeles River Area (ULARA) Watermaster.

One of the primary reasons these same MCL-based limits, originally imposed to protect the surface water "potential" MUN beneficial use, were overturned by the Superior Court was the fact that the Regional Board failed to include findings, and to support findings made with evidence in the administrative record. The Regional Board is committing a similar prejudicial abuse of discretion now as it tries to "backdoor" the same requirements included in the City's prior NPDES permit, but on different grounds. Such action is improper as these limits are not based on legal water quality objectives applicable to the GWR beneficial use in this case.

The issue presented here is distinctly different than the issue previously presented to the State Board in 2003 in the *Whittier Narrows* case, discussed in State Board Order No. 2003-0009, related to calculating effluent limitations imposed upon Los Angeles County Sanitation District's Whittier Narrows WRP to protect a surface water GWR beneficial use. The State Board's decision in that case is inapplicable here, because the permit for the Whittier Narrows WRP regulated discharges that were, in part, designed and intended for groundwater recharge. *See* Testimony of Anne Heil, Hearing Transcript at pgs. 40-41. Here, the City's discharge is not used for groundwater recharge, and, unlike the Whittier Narrows case, the groundwater has not been proven to, in fact, be recharged with water from the Glendale Narrows (which may contain some portion from the Burbank Plant). *Id; see also* footnote 7. As such, the GWR beneficial use, as originally generically applied in the Basin Plan to the Los Angeles River, is not an "existing" or "attainable" beneficial use that must be protected by the imposition of effluent limitations based on Title 22 MCLs. The Regional Board should, instead, be conducting and approving a Use Attainability Analysis to remove or adjust the GWR beneficial use in accordance with 40 C.F.R. §131.10(e)-(g). *See* SWRCB Order No. 2002-0015 at pg. 15 ("In general, the Board agrees that, where a Regional Water Quality Control Board (Regional Board) has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use. This is true at least in the interim until the Regional Board either successfully amends the basin plan to dedesignate the use or determines that the use cannot be legally dedesignated. At a minimum, where a Regional Board has evidence that a use neither exists nor likely can be feasibly attained, the Regional Board must expeditiously initiate appropriate basin plan amendments to consider dedesignating the use.")

The State Board's decision on the Whittier Narrows WRP matter should, however, be precedential with respect to the fact that the Regional Board must first determine whether the

City's discharge has "reasonable potential" to cause or contribute to an exceedance of a water quality objective that corresponds to the GWR beneficial use before imposing effluent limitations. Importantly, there are no water quality objectives that were adopted for protection of, or correspond to, the GWR beneficial use. *See* State Board Order No. 2003-0009 at pg. 10.

In this case, the Fact Sheet does not contain adequate information on the necessity for MCL-based effluent limits, and the Regional Board did not conduct a reasonable potential analysis on each of the proposed constituents for which limits were imposed. *See* Permit at Discharge Requirements Section I.A.2. (Nitrate, arsenic, bis-2, iron, trihalomethanes all added with no specific reasonable potential analysis discussion in Fact Sheet); *see also* Fact Sheet at pg. F-35 (MBAS), pg. F-39 (turbidity and radioactivity). Furthermore, in any "reasonable potential" analysis that was attempted, surface waters were used as the ambient background instead of the *groundwater*, which is the water body that the Title 22 MCL-based effluent limitations are imposed to protect. *See* Fact Sheet at F-28. The City provided evidence that the groundwater does not come close to exceeding the MCLs. *See* Burbank's Powerpoint Presentation from Hearing, attached as Exhibit C; *see also* Testimony of R. Andersen, Hearing Transcript at pgs. 30-32. Since Burbank has been discharging to this stretch of the River for decades, if its effluent were causing degradation, the levels seen would be much higher. That is not the case. Thus, there is no reasonable potential for the City's discharge to exceed the MCLs in the groundwater basin and no MCL-based limits were needed.[11]

Since neither the Permit nor the Fact Sheet contain evidence that the beneficial uses of groundwater are impaired or that the local groundwater exceeds the MCLs for the constituents being proposed for regulation in the Permit, no valid basis exists to impose these effluent limits.[12]

---

[11] The City recognizes that there are CTR-based limits that might be appropriate should reasonable potential exist to exceed those criteria, and is not challenging the imposition of appropriate CTR-based limits in lieu of MCL-based limits for the same constituents.

[12] In addition, for any limits where immediate compliance was deemed infeasible and interim limits were provided (see Permit at Section I.A.9), the Regional Board has failed to consider non-numeric effluent limits, such as source control and pollution prevention in lieu of these interim limits and the final numeric limits imposed in Section I.A.2. 40 C.F.R. §122.44(k)(3); *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089*In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society*, Order No. WQ 91-03, May 16, 1991).

2. MCLs Are Not Intended to Apply to Surface Water Discharges.

The MCLs set forth in Title 22 of the California Code of Regulations were intended only to apply to drinking water treatment facilities at the tap or point-of-use, not as "end-of-pipe" effluent limitations for wastewater treatment facilities to protect a GWR beneficial use. *See* 22 C.C.R. §§64431 and 64444. Since the reclaimed water produced at the City's treatment facility is not used for direct potable purposes, the Title 22-based effluent limits imposed as monthly averages and daily maximum limits in the Permit are unnecessarily restrictive and inappropriate for treated water than can only be reused for indirect potable reclaimed water use (*e.g.*, landscape irrigation, industrial process water). In most cases, MCLs are also intended to be applied as 12-month rolling averages. *See* 22 C.C.R. §64432.

Even if the secondary MCLs validly applied through the chemical constituents objective, the validity of which is questioned below, the Permit's compliance requirement is inconsistent with how DHS enforces MCLs. Secondary MCLs are set for constituents that may adversely affect the taste, odor, or appearance of drinking water, and are directly related to consumer "acceptance" or "dissatisfaction" with drinking water provided through a community water system. *See* 22 C.C.R. §64449. If a secondary MCL for a constituent contained in Table 64449-A is exceeded, an investigation by DHS and a study by the water supplier is required to determine consumer acceptance or dissatisfaction with the drinking water that does not meet the particular MCL. *See* 22 C.C.R. §64449(d). If there is no community water system as in this case and no direct MUN use, there are no consumers to be surveyed and, thus, no acceptance or dissatisfaction to measure.

In addition, DHS is permitted to waive the requirement to meet secondary MCLs based upon economic considerations. *See* 22 C.C.R. §64449(e). However, exceedances of secondary MCLs included in a NPDES permit as end-of-pipe effluent limitations may subject dischargers to minimum mandatory penalties and/or other civil and criminal liability authorized by the Clean Water Act and the Water Code. *See, e.g.*, 33 U.S.C. §§1319(d) and 1365; Water Code §§13385 and 13387. Therefore, the inclusion of secondary MCLs in the Permit is unwarranted and inappropriate.

3. The Regional Board Failed to Comply with Water Code Section 13263(a) When Imposing Effluent Limits Based on Title 22 Drinking Water Standards.

The Regional Board, when prescribing waste discharge requirements in the form of an NPDES permit, and where the provisions at issue are "more stringent than federal law"[13] (in this case, protection of groundwater that is outside the purview of the Clean Water Act by requiring compliance with state drinking water standards), must take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241. *See* Water Code §13263(a)(emphasis added).

As discussed above, the Regional Board included effluent limits in the Permit based on Title 22 drinking water standards to protect a surface water GWR beneficial use, not a surface water MUN beneficial use. MCLs, if legally valid at all and applicable in an NPDES permit, would apply, at most, for surface waters to an MUN use. *See* Basin Plan at pgs. 3-8 to 3-10, Tables 3-5, 3-6, and 3-7 (all referencing "for MUN beneficial use"). In this case, the Los Angeles River is designated only with a "potential" MUN beneficial use. The Basin Plan at pg. 2-4 prohibits the "potential" MUN beneficial from being used to set effluent limits. *See*, *accord*, Fact Sheet at Finding 4. Furthermore, the Fact Sheet at Finding 8 seemingly confirms that the real purpose of the effluent limitations is to protect the MUN beneficial use of the underlying groundwater. However, the Regional Board failed to conduct the analysis the State Board deemed necessary in State Board Order No. 2003-0009 (LACSD/Whittier Narrows WRP) to impose effluent limitations for protection of groundwater.[14] By imposing effluent limits based on Title 22 MCLs to solely

---

[13] *City of Burbank v. State Water Resources Control Board, et al.*, 35 Cal. 4th 613, 617, 628-9 (2005).

[14] In addition, factual differences exist between the Burbank discharge and the Whittier Narrows discharge. Burbank's discharge is to a concrete-lined channel, whereas Whittier Narrows discharges to a soft bottom channel. (*See* Burbank Permit at Findings 16-17; Order No. R4-2002-0142 and SWRCB Order No. 2003-009 at pgs. 2-3). Whittier Narrows discharges to actual spreading grounds, the intent of which is to recharge groundwater. *See* Testimony of Anne Heil, Hearing Transcript at pgs. 40-41. Burbank discharges have not been proven to actually reach groundwater at all given that the only soft-bottomed stretch through which Burbank's discharge flows (commingled with all other water) is classified as a gaining reach. (*See* Permit at Finding 17) For these reasons, the analysis in the Whittier Narrows decision justifying the use of the GWR use cannot be used as a binding precedent in this case.

protect the GWR beneficial use, the Regional Board failed to consider the water quality objectives reasonably required to protect the GWR use, and failed to consider the provisions of Water Code §13241.[15]

4. The Regional Board's Adoption and Implementation of the Chemical Constituents Narrative Water Quality Objective Violates Federal and State Law.

The Regional Board's adoption of the narrative water quality objective for "chemical constituents," specifying that surface waters designated for use as domestic or municipal supply ("MUN") shall not contain concentrations of chemical constituents in excess of the MCLs in effect at the time the chemical constituents objective was adopted and including any prospective, future changes to the MCLs contained in Title 22, violated Water Code sections 13241 and 13000. *See* Basin Plan at 3-8. Water Code section 13241 requires the Regional Board to consider the social, environmental and economic impacts of water quality objectives prior to adoption. No evidence in the record exists to indicate that the Regional Board complied with Water Code section 13241 when it initially adopted the surface water quality objective for chemical constituents and the corresponding MCLs in effect at that time.[16]

Additionally, by using a prospective, incorporation-by-reference method of adopting water quality objectives for water bodies or ground water basins designated MUN, the Regional Board is abdicating its responsibility to consider the factors contained in Water Code sections 13241 each time a new or more stringent MCL is incorporated into Title 22. Furthermore, through the use of the prospective, incorporation-by-reference method of adopting water quality objectives for those water bodies or ground water basins designated MUN, the Regional Board is failing to comply with the applicable public notice and participation requirements of the Clean Water Act and the Water Code. Finally, by adopting this method of adopting water quality objectives, the Regional

---

[15] The Regional Board conducted a cursory 13241 analysis on the requirements for bis(2-ethylhexyl)phthalate, but failed to undertake this analysis for any other MCL-based requirements.

[16] The Permit's findings discuss the DHS process for adopting MCLs (see Permit at Finding 29), but the Regional Board cannot legally delegate its authority to adopt WQOs to the DHS, and must comply with all Water Code requirements, including section 13241 and 13242, whenever adopting new objectives.

Board failed to comply with Water Code section 13000, providing for reasonable water quality regulation.

C. The Regional Board Improperly Included Effluent Limitations Where No Reasonable Potential Exists, Or Where No Findings or Evidence Were Included in the Permit Justifying a Finding of Reasonable Potential.

Before including effluent limitations in an NPDES permit, the Regional Board must first determine that the discharge has the "reasonable potential" to cause or contribute to an exceedance of a water quality objective. If no "reasonable potential" exists, effluent limitations are not required under federal law. *See* 40 C.F.R. §122.44(d)(1)(i) and (ii); *see also* State Board Order No. 2003-0012 at pg. 16. In State Board Order No. 2003-0012, the State Board found that no effluent limitations are required for constituents for which the Regional Board found there was no reasonable potential. Further, with respect to the applicability of anti-backsliding to effluent limitations that are removed due to a lack of reasonable potential, the State Board stated it is:

> "not clear that the deletion of [existing] effluent limitations [for lack of reasonable potential] even falls under the anti-backsliding rule, but if it does, if falls within an exception to the rule. Water quality-based effluent limitations may be relaxed in a later permit based on new information. [fn omitted]. The new information consists of the monitoring studies conducted that showed a lack of reasonable potential. The absence of these effluent limitations also does not violate the anti-degradation policies stated in State Board Resolution 68-16 and 40 Code of Federal Regulations section 131.12 since the permits will result in improved water quality because effluent limitations are more stringent for pollutants that do have the potential to affect water quality."

In conclusion, the State Board held that: "[t]he Regional Board acted appropriately and lawfully in omitting effluent limitations for pollutants for which there is no reasonable potential of causing or contributing to violation of water quality standards." State Board Order No. 2003-0012 at pg. 17, para. 7 (emphasis added).

In this case, the Regional Board failed to demonstrate that the City's discharge has a "reasonable potential" for settleable solids, oil and grease, chlorine, total dissolved solids, sulfate,

chloride, MBAS, nitrate, nitrite, ammonia, coliform, turbidity, radioactivity, and acute toxicity.[17] For mercury, reasonable potential was determined from a single detected, but not quantified ("DNQ") value in one effluent sample, which should not have been adequate justification for imposition of an effluent limit. For these reasons, the Regional Board is violating federal regulations and State Board precedential orders by including effluent limitations where there are inadequate findings and evidence demonstrating reasonable potential using recent data. 40 C.F.R. §122.44(d)(1); SWRCB Order No. 2003-0012.

Furthermore, for cadmium and lead, no reasonable potential was found, but limits were prescribed anyway. The Permit indicates that the effluent limitations for lead and cadmium are based on the LA River Metals TMDL. *See* Permit at Findings 49.C. and 52.D, and Discharge Requirements Section I.A.2.(b), footnotes 7-9. This is inconsistent with the discharge limits shown on pg. 32, Section I.A.2, which are not based on the Metals TMDL wasteload allocations ("WLAs"), but were calculated from California Toxics Rule ("CTR") objectives following the SIP method. The value in the previous draft permit for cadmium was from the TMDL, representing a wasteload allocation. Thus, footnotes [7] and [8] on pg. 33 of the Permit, which state that these new limits are WLAs are incorrect. These are not WLAs, but calculated CTR-based effluent limits.[18]

D. Daily Maximum Effluent Limitations Were Included in the Permit, Even Though No Findings or Evidence Exist to Justify the Impracticability of Weekly or Monthly Effluent Limitations in Accordance with 40 C.F.R. §122.45(d)(2).

---

[17] In addition, on top of the effluent limitations prescribed, the Permit makes the City comply with all applicable water quality objectives for the receiving waters, including the toxics criteria in the National Toxics Rule, 40 C.F.R. §131.36, even in most instances where no reasonable potential exists. *See* Permit at pg. 48, Section IV.M.

[18] As shown on the calculation sheets created by Regional Board staff, reasonable potential does not exist for cadmium or lead under the CTR and, therefore, no effluent limits are required. Although the Permit at Finding 49.C. states that "Reasonable Potential Analysis (RPA) showed exceedances of the water quality objectives in receiving water and the pollutants were detected in the effluent for these metals," this reference to the receiving water studies performed within the TMDL relate to Los Angeles River ambient water generally, and does not specifically analyze the portion of the Los Angeles River to which the City's discharge eventually flows. In fact, neither cadmium nor lead in the local receiving water at the City's R-1 monitoring site nor the City's effluent show reasonable potential to exceed the objectives or the WLAs. Therefore, according to federal regulations requiring RP before effluent limits are imposed, CTR-based limits should not be imposed upon the City. 40 C.F.R. §122.44(d)(1)(i), (ii), and (vii)(B); *see* Hearing Transcript at pgs. 85-89.

Where effluent limitations are authorized, federal regulations provide that for discharges from publicly-owned treatment works ("POTW"), such as the City's treatment facility, all permit effluent limits shall, *unless impracticable*, be stated as average weekly and average monthly discharge limitations. 40 C.F.R. §122.45(d)(2) (emphasis added); *see also* State Board Order No. 2002-0012) (East Bay Municipal Utility District) (July 18, 2002) at pgs. 20-21. Despite this clear mandate, the Regional Board included daily maximum limitations in the Permit without first making the requisite determination of impracticability for each constituent, or without evidence to support its findings of impracticability (where made). *See* Permit at Discharge Requirements Section I.A.2, and Fact Sheet. These limits should be removed by the State Board, or, alternatively, remanded to the Regional Board, so that an impracticability analysis may be performed. *See accord* Statement of Decision, *City of Burbank v. State Water Resources Control Board*, Los Angeles County Superior Court Case No. BS 060960 (April 4, 2001) (invalidating daily maximum effluent limitations contained in the City's existing NPDES permit because the Regional Board failed to conduct or support impracticability analysis with findings and evidence in the administrative record).[19]

For many daily effluent limits imposed (*e.g.*, ammonia, cadmium, chromium IV, copper, lead, mercury, selenium, zinc, dibromochloromethane, dichlorobromomethane, bis(2-ethylhexyl)phthalate, and gamma-BHC (lindane)), no impracticability analysis was performed at all on a constituent-by-constituent basis in violation of 40 C.F.R. §122.45(d)(2). In fact, two new daily limits for cadmium and lead were inserted late in the permit drafting process with no discussion whatsoever.

For some constituents, there is a cursory finding of impracticability; however, these purported findings of impracticability are unsupported by evidence in the record. Orders not supported by the findings or findings not supported by the evidence constitute an abuse of discretion. *See* 40 C.F.R. § 124.8(b)(4); *Topanga Association for a Scenic Community v. County*

[19] The State Board and Regional Board did not appeal the Superior Court's decision in the *City of Burbank* case with respect to the inclusion of daily maximum effluent limitations for POTWs. Thus, the Superior Court's decision stands and is binding in this case. *See* 2001 Superior Court, Statement of Decision at pgs. 12-13.

of Los Angeles, 11 Cal.3d 506, 515; *California Edison v. SWRCB*, 116 Cal. App. 751, 761 (4th Dt. 1981); *see also In the Matter of the Petition of City and County of San Francisco, et al.,* State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). The Regional Board must make findings based on evidence in the record and may not merely tick off statutory requirements and claim compliance without supporting evidence. *See City of Carmel-by-the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (holding that written findings of fact were insufficient as a matter of law because they were merely a recitation of the statutory language).

In addition, the Regional Board may not rely on speculation in reaching a decision. Rather, it must be clear from the record that the Regional Board actually relied upon solid evidence to support its findings, and that this clearly identified and cited evidence supports the agency's findings and ultimate conclusion. Further, the Regional Board must adequately demonstrate a rational connection between the evidence, the choices made, and the purposes of the enabling statute. *See California Hotel & Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212 (1979). The level of detail that must be included in the Regional Board's consideration must clearly demonstrate the "analytical route" contemplated under *Topanga. See Department of Corrections v. State Personnel Board,* 59 Cal.App.4th 131, 151 (1997). It is insufficient for the Regional Board to simply cite to unsubstantiated findings of impracticability without proof.[20]

---

[20] For BOD_5, defined as "the five day measure of the pollutant parameter biochemical oxygen demand (BOD)" in 40 C.F.R. §133.101(d), and Suspended Solids ("SS"), the Regional Board concedes that daily limits are not required by federal law. However, the Regional Board refuses to remove these limits "because none of the anti-backsliding exceptions apply." *See* Fact Sheet at F-33. However, anti-backsliding does not apply to technology-based treatment requirements (*e.g.*, based on CWA section 301(b)(1)(B)(as set forth in 40 C.F.R. Part 133 as weekly and monthly averages)); rather, anti-backsliding applies to water quality-based limits set based on CWA sections 301(b)(1)(C) and 303(d) and (e). 33 U.S.C. §1342(o)(1). Therefore, this finding related to anti-backsliding and the daily maximum limits for BOD_5 and SS should be remanded for removal from the Fact Sheet.

In a recently issued permit by the San Diego Regional Water Quality Control Board, the following anti-backsliding justification was provided for removal of daily maximum limitations:

> "Order No. R9-2006-002 does not retain the maximum at anytime concentration [...] for $CBOD_5$ and total suspended solids contained in Order No. 2000-012 and previous permits for the Discharger which were established using best professional judgment. Recent attempts to derive maximum at anytime limitations based on the secondary treatment standards at 40 CFR 133 using appropriate statistical approaches did not yield similar results as the previous maximum at anytime limitations; therefore, based on this new information, retaining the previous maximum at anytime limitations in Order No. R9-2006-002 is not supported."

A similar justification exists to remove the daily limits from the City's Permit under the new information exception to anti-backsliding. *See accord* SWRCB Order No. 2003-0012 at pg. 16; 33 U.S.C. §1342(o)(2)(B)(i). Another equally

With respect to the daily maximum effluent limitations for settleable solids and oil and grease, the Regional Board summarily concludes, without supporting evidence, that a weekly average limit for either of these substances "would not be adequately protective of all beneficial uses." *See* Fact Sheet at pg. F-33 to F-34, paras. b and c. However, no examples or evidence of any use impairments are provided. Thus, these analyses are inadequate. Furthermore, the Regional Board prematurely concluded that no exceptions to the rule against antibacksliding applied. Since no reasonable potential analysis was conducted for either of these substances, it is not clear that the new information exception would not apply. Further, there is no evidence that the City's discharge is "causing nuisance or adversely affecting beneficial uses" thereby justifying an effluent limit for settleable solids or oil and grease. The effluent and receiving water limitations imposed are adequate protection for the receiving waters, and the re-opener at Reopeners and Modifications Section V.C. of the Permit provides the ability for the Regional Board to insert more stringent limitations should the need ever arise.

For bis(2-ethylhexyl)phthalate, even though the Regional Board changed its justification for changing the bis-2 monthly from the federal human health criteria of 5.9 µg/L to 4.0 µg/L as an MCL-based limit, the Regional Board failed to remove the daily limit as was done with the other Title 22 MCL-based limits of arsenic, iron, and trihalomethanes. *See* Permit at Provision I.A.2.a. and b. No daily limits for bis(2-ethylhexyl)phthalate are justified, and the Regional Board cannot simply mix and match justifications for daily limits.

The State Board cannot ratify the Regional Board's action based on the SIP's citation to the use of daily maximum effluent limitations. *See* SIP at § 1.4. The SIP does not apply to conventional pollutants. Many of the constituents given daily maximum limits were conventional

---

applicable justification for an exception to anti-backsliding would be "technical mistakes or mistaken interpretations of the law were made in issuing the permit" previously. 33 U.S.C. §1342(o)(2)(B)(ii).

Inclusion of these daily limits without the mandated impracticability analysis under 40 C.F.R. §122.45(d)(2), or without a Water Code section 13263 analysis, required because these requirements are more stringent than federal law, would most certainly quality under the "mistake of law" criteria. *See* 40 C.F.R. §§122.44(l)(1), 122.62(a)(15); *see also* 33 U.S.C. §1342(o)(2)(B)(ii). These exceptions apply notwithstanding the fact that the City has been able to meet the limits previously. For these reasons, the daily limits for BOD_5 and SS should be removed. If maintained, then the Regional Board was required to perform additional analysis since these limits were more stringent than required by federal law. *City of Burbank v. SWRCB,* 35 Cal. 4th at 628-9.

pollutants (*e.g.,* BOD and suspended solids) or non-priority pollutants (*e.g.,* oil and grease, settleable solids). In those cases, the federal regulation would control.

In addition, in enacting the SIP for priority pollutants, the State Board may have *attempted* to modify the federal regulatory prohibition on the use of daily or instantaneous maximum limits for POTWs by stating: "[f]or this method only [referring to limits for aquatic life protection] maximum daily effluent limitations shall be used for publicly-owned treatment works (POTWs) in place of average weekly limitations." *See* SIP at § 1.4. However, prior to authorizing the use of daily or instantaneous maximum limitations in POTW permits for compliance with aquatic life criteria in the SIP, the State Board did not demonstrate that the imposition of average weekly and average monthly effluent limitations for the protection of aquatic life was "impracticable" per the requirements of 40 C.F.R. §122.45(d). Therefore, the State Board's authorization in the SIP of daily or instantaneous maximum limitations for compliance with aquatic life criteria does not meet federal requirements or Water Code Chapter 5.5 requirements for consistency with federal requirements. Moreover, the SIP requirements are more stringent than federal law. As such, the Regional Board must still perform an impracticability analysis or a Water Code section 13263 analysis before imposing daily maximum interim and final effluent limitations based on aquatic life criteria (*e.g.,* mercury, selenium, dibromochloromethane).

Furthermore, the State Board did not include in the SIP the same language purportedly allowing for the inclusion of daily maximum limitations in POTW permits for effluent limitations based upon human health criteria. Therefore, 40 C.F.R. §122.45(d) requires the Regional Board to perform an impracticability analysis before imposing daily maximum effluent limitations based on human health related criteria (whether CTR-based or Title 22 MCL-based). Thus, for any limits based on chronic exposures (either criteria continuous concentration (CCC), human health (organisms only) criteria under the CTR, or MCLs), such as mercury, selenium, dibromochloromethane, dichlorobromomethane, bis-2, and lindane, daily maximum effluent limits are not justifiable, and monthly average limits are not impracticable. *See, accord, In the Matter of the Own Motion Review of the City of Woodland,* SWRCB Order No. WQ 2004-0010 (removed

short term effluent limits, holding that implementing the limits as short term averages was incorrect because the criteria was intended to protect against chronic, long-term effects.)

Finally, for technology-based or human health criteria, average weekly or monthly (or longer - *e.g.*, rolling annual average) effluent limitations must not be *per se* impracticable as the Regional Board included monthly average limitations in the Permit. *See* Permit at Discharge Requirements I.A.2. Furthermore, human health criteria are not intended to regulate acute toxicity, but to address instances of long term daily exposure to drinking water (not an issue for these Permits) or ingestion of aquatic organisms in an amount of 6.5 grams/day over 70 years. Given these facts, longer term averages would be practicable, and daily maximum limitations would not be necessary or sanctioned.[21]

Therefore, the Regional Board's inclusion of effluent limitations shorter than weekly or monthly averages in the Permit violated 40 C.F.R. §122.45(d)(2), as there were either no findings of impracticability made by the Regional Board for each constituent being regulated, or any findings made were not supported by evidence. By violating federal and state law, the Regional Board proceeded without, or in excess of, its jurisdiction and committed a prejudicial abuse of discretion by not proceeding in a manner required by law. For these reasons, and given the precedent set in State Board Orders cited above, the State Board should direct the Regional Board to remove all daily maximum effluent limitations from the Permit unless longer term averaging periods are actually proven with findings supported by evidence in the administrative record to be impracticable.

E. The Permit Includes Requirements More Stringent than Mandated by Federal Law.

The Permit includes provisions more stringent than required by federal water quality laws (*e.g.*, the Clean Water Act and its implementing regulations), such as daily limits for conventional

[21] For example, if the pollutant would require a long exposure period before having a toxic and adverse human health effect, then a average monthly or weekly limits would be more than adequately protective of water quality standards.

and other pollutants (above in Section 5.D.), mass limits in addition to concentration limits,[22] state Title 22-based limits instead of federal criteria (above in Section 5.B.), effluent limits imposed where no demonstrated reasonable potential (see above in Section 5.C.), without the requisite analysis mandated under Water Code section 13263, including the factors set forth in Water Code section 13241. As required by the California Supreme Court, where requirements are imposed that are more stringent than required by federal law, the Regional Board was required to conduct additional analysis under state law. *See City of Burbank v. SWRCB,* 35 Cal. 4th at 617, 628-9 (2005); Water Code §13263. This was not done, except arguably for the limits imposed for bis(2-ethylhexyl)phthalate.[23] Since this analysis was not undertaken for all other requirements more stringent than federal law, the Permit must be remanded to the Regional Board for this additional analysis.

F. The Permit Requires Excessive and Unnecessary Monitoring Requirements.

The Permit contains excessive and unnecessary monitoring requirements not justified under Water Code sections 13267(b) and 13325(c), including groundwater monitoring. The groundwater monitoring requirements were originally included in the first tentative permit when the Regional Board was proposing to impose groundwater limits for MCL-based constituents, instead of effluent limits. After removal of the groundwater receiving water limits, the monitoring for those limits should have been removed, but was not. *See* Monitoring and Reporting Program at pg. T-25, Section IX. Maintenance of these requirements is excessive and unnecessary, and should be remanded to the Regional Board for removal.

---

[22] Mass limits are not required under federal law where water quality standards or effluent limitations are prescribed and "expressed in other units of measurement." 40 C.F.R. §122.45(f)(1)(ii). Thus, to exercise its discretion to prescribe both mass limits and concentration limits, the Regional Board prescribed requirements more stringent than REQUIRED by federal law. For this reason, additional analysis was required. In addition, the justification for the inclusion of mass limits consisted of findings not supported by evidence in the record. Mass limits are prescribed to "ensure that proper treatment, and not dilution, is employed to comply with the final concentration effluent limits." *See* Finding 33 at pg. 16. Such a justification is not compelling or necessary since proper treatment is already required under the Permit. *See e.g.,* Section IV.C. requiring compliance with standard provisions including proper operation and maintenance. Furthermore, dilution of up to 9 mgd of treated effluent with potable water would not only be extremely expensive, but would be difficult if not impossible to purchase or use millions of gallons of potable water for a non-beneficial use.

[23] Even for the analysis done, that analysis was not specific to Burbank and was based on dated information.

G. The Permit Includes Unnecessary, Inconsistent, and Unreasonably Duplicative Requirements.

1. Storm Water Regulation

The Permit at pg. 48, Requirements and Provisions Section IV.N. states:

> "The Discharger shall comply with the requirements of the State Board's General NPDES Permit No. CAS000001 and *Waste Discharge Requirements for Discharges of Stormwater Associated with Industrial Activities* (Order No. 97-03-DWQ) by continuing to implement a SWPPP and conducting the required monitoring." (emphasis in original).

Under the terms of General NPDES Permit referenced above, and the City's Notice of Intent, the City is already *independently* required to comply with the General NPDES Permit. The incorporation into this Permit of a requirement to comply with another, wholly separate NPDES permit for storm water is duplicative, unnecessary, unreasonable. The Permit will unnecessarily and unreasonably subject the City to increased exposure to civil and criminal penalties and enforcement by third party citizen suits for any alleged violation of the General NPDES Permit.

In addition, this provision is expressly contrary to Finding 15, which states that "The industrial stormwater discharge from the Burbank SPP is not regulated under this individual NPDES permit, but is instead regulated under the Statewide General Stormwater Permit for Industrial Discharges." Like the Burbank SPP discharges, the Burbank Water Reclamation Plant industrial stormwater discharges should be regulated solely under the Statewide General Stormwater Permit for Industrial Discharges. There is no need for duplicative requirements in this NPDES permit since those discharges are already permitted under a separate permit.

For these reasons, the City requests the State Board to remove Requirements and Provisions Section IV.N. from the Permit, or, alternatively, remand the Permit to the Regional Board to remove or modify this provision in accordance with State Board directives.

2. Inconsistent Footnotes

The effluent limits in Section I.A.2. have numerous footnotes. However, these footnotes are not consistently applied. For example, not all mass limits on page 31 in Section

I.A.2.a. have footnote [3] and not all mass limits on page 32 in Section I.A.2.b. have footnote [4], even though there is no justification for non-inclusion of these footnotes to all mass limits. Similarly, footnote [5] on page 33 should have applied to all priority pollutants, but was not so applied. To fix these inconsistencies, the State Board should remand the permit back to the Regional Board.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONER:

A true and correct copy of this Petition was mailed by First Class Mail on December 11, 2006 to the Regional Board at the following address:

Mr. Jonathan Bishop
Executive Officer
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, California 90013

The Petitioner in this case is the recipient of the Permit; therefore, a Petition was not separately sent to the recipient of the Permit.

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD:

The substantive issues and/or objections to the contested provisions of the Permit raised herein were raised before the Regional Board in both written and oral comments.

10. PETITIONER'S REQUEST FOR EVIDENTIARY HEARING:

For the reasons set forth above, the City requests that the State Board conduct a full evidentiary hearing to consider this Petition in accordance with Title 23, California Code of Regulations, section 2052.

11. PETITIONER'S REQUEST FOR ABEYANCE:

The City requests that the State Board place the City's Petition for Review in abeyance pursuant to Title 23, California Code of Regulations, section 2050.5(d). This will allow the City to attempt to resolve the City's concerns with the Regional Board both informally and before the Los Angeles County Superior Court as part of the remand proceedings from the California Supreme Court in *City of Burbank v. State Water Resources Control Board, et al.*, Los Angeles County

Superior Court Case No. BS 0609060. Should those events not be productive, the City may request that the abeyance be lifted and the petition go to the State Board for review at that time.

Respectfully Submitted,

DATED: December 11, 2006

DOWNEY BRAND LLP

By: _____

MELISSA A. THORME
Attorneys for Petitioner
CITY OF BURBANK

DOWNEY BRAND LLP

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California, 95814-4686. On October 11, 2006, I served the within document(s):

PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW; AND REQUEST FOR EVIDENTIARY HEARING

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

Jonathan Bishop
Executive Officer
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 11, 2006, at Sacramento, California.

Becky A. Brasher

BECKY A. BRASHER

DOWNEY BRAND LLP

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER NO. R4-2006-0085

NPDES PERMIT NO. CA0055531

CITY OF BURBANK

BURBANK WATER RECLAMATION PLANT

TABLE OF CONTENTS

TABLE OF CONTENTS

State of California
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER NO. R4-2006-0085

NPDES NO. CA0055531

WASTE DISCHARGE REQUIREMENTS
CITY OF BURBANK
(Burbank Water Reclamation Plant)

The California Regional Water Quality Control Board, Los Angeles Region (hereafter Regional Board), finds:

PURPOSE OF ORDER

1. City of Burbank (hereinafter the City or Discharger) discharges tertiary-treated wastewater, from its Burbank Water Reclamation Plant (Burbank WRP) and cooling tower blowdown and boiler blowdown from its Burbank Steam Power Plant (Burbank SPP), to the Burbank Western Channel, tributary to Los Angeles River, waters of the United States. The discharge is regulated under waste discharge requirements contained in Order No. 98-052, adopted by this Regional Board on June 29, 1998, which superceded Order No. 96-050. Order No. 98-052 also serves as a permit under the National Pollutant Discharge Elimination System (NPDES No. CA0055531).

2. Order No. 98-052 has an expiration date of May 10, 2003. Section 122.6 of Title 40, Code of Federal Regulations (40 CFR) and Section 2235.4 of Title 23, California Code of Regulations (CCR), state that an expired permit continues in force until the effective date of a new permit, provided that the permittee has made a timely submittal of a complete application for a new permit. On September 28, 2001, the City filed an incomplete Report of Waste Discharge (ROWD) and applied to the Regional Water Quality Control Board (Regional Board) for reissuance of waste discharge requirements (WDRs) and a NPDES permit to discharge tertiary-treated wastewater, cooling tower blowdown, boiler blowdown water, stormwater, and demineralizer water. Therefore, the Discharger's permit has been administratively extended until the Regional Board acts on the new WDR and permit. On July 2, 2002, the City submitted a complete ROWD. On August 2005, the Discharger met with Regional Board staff and, through a presentation, provided updated information to assist in the permit renewal process. On November 22, 2005, the Regional Board received a letter from the City, dated November 8, 2005, transmitting additional information.

3. This Order is the reissuance of waste discharge requirements that serves as a NPDES permit for the Burbank WRP. Since the discharge from the Burbank Steam Power Plant

was discontinued, and is instead re-routed to the sewer, this Order will also rescind the WDR for the Burbank Steam Power Plant's discharge through Discharge Serial No. 001.

LITIGATION HISTORY

4. On December 2, 1998, the City of Burbank filed a petition with the State Board for a stay of Order No. 98-052. The State Board dismissed the City of Burbank's petition for review and its request for a stay without review.

On December 23, 1999, the City of Burbank filed a Petition for a Writ of Mandate and application for stay challenging their permit (Order No. 98-052) and their Time Schedule Order. On December 29, 1999, the Court issued a stay of the following 31 contested effluent limits contained in Order No. 98-052 for the Burbank WRP: ammonia nitrogen, arsenic, bis(2-ethylhexyl)phthalate, bromodichloromethane, bromoform, cadmium, chloroform, chromium VI, copper, cyanide, 2,4-D, detergents, dibromochloromethane, 1,4-dichlorobenzene, 1,2-dichloroethane, endrin, ethylbenzene, iron, lead, lindane, mercury, methylene chloride, nickel, selenium, silver, 2,4,5-TP (Silvex), tetrachloroethylene, toluene, total phosphates, total residual chlorine, and zinc.

In April 2000, the City of Burbank tried to amend its Petition to Writ of Mandate and the Judicial Stay to expand the list of stayed effluent limits to include the following effluent limitations: acute toxicity, chronic toxicity, coliform, manganese, nitrite + nitrate-N, and turbidity. The City also tried to delete ammonia nitrogen from the list of constituents because it was incorrectly included in the appeal. However, the court denied the City of Burbank's requests to modify the original list of 31 constituents under appeal.

On August 21, 2000, the City of Burbank filed a complaint against the United States Environmental Protection Agency for declaratory and injunctive relief with the United States District Court, Central District of California, Western Division (*City of Los Angeles, City of Burbank, City of Simi Valley, and County Sanitation Districts of Los Angeles County, by and through their agent County Sanitation District Number 2 of Los Angeles County vs. United States Environmental Protection Agency, and Alexis Strauss, Director, Water Division, United States Environmental Protection Agency, Region IX [Case No. BS 060 960]).* The matter went before the court on August 31 and September 1, 2000 with a final decision overturning portions of USEPA's partial approval letter of May 26, 2000 related to the conditional potential MUN (p* MUN) beneficial use for surface waters.

On November 30, 2000, the Superior Court of the State of California filed its Decision on the Submitted matter [Case No. BS *060 960*] and ordered counsel for the petitioner to prepare, serve, and lodge a proposed Statement of Decision, Judgement and Writ, on or before December 14, 2000. Respondents were given until December 28, 2000, to serve and file objections. Respondents filed objections on January 19, 2001, and Petitioners lodged a revised proposed Statement of Decision, Judgement of Writ, and a response to Respondent's objections on February 13, 2001.

On April 4, 2001, the Superior Court of the State of California signed and filed its

Statement of Decision, ordering that judgement be entered granting the Petitioners' petition for a Writ of Mandamus, commanding the Respondents to vacate the Contested Effluent Limits, and ordering the adoption of new effluent limits at a new hearing.

In its December 24, 2002, opinion, the Court of Appeal unanimously reversed the trial court decision; and, made the following determinations:

a. Cost Issues - For existing objectives, water quality-based effluent limitations (WQBELs) must be developed without reference to costs and Clean Water Act (CWA) Section 301(b)(1)(C) does apply to POTWs. (POTWs are not exempt from WQBELS.)

b. CEQA Requirements – The Environmental Impact Report (EIR) exemption in Section 13389 of the Water Code means that "CEQA imposes no additional procedural or substantive requirements" other than compliance with the CWA and Porter-Cologne Act. (NPDES permits are exempt from CEQA.)

c. Compliance Schedules - Compliance schedules may be included within a NPDES permit only if the applicable water quality standards or water quality control plans permit inclusion of compliance schedules it. (Compliance schedules must be contained in a Time Schedule Order or similar enforcement document if the Basin Plan does not allow the inclusion of compliance schedules in a NPDES permit.)

d. Narrative Toxicity - The Regional Board's narrative toxicity objective which was upheld does not violate 40 CFR 131.11(a)(2). (The narrative standard can remain in NPDES permits as an effluent limitation.)

Although the Court of Appeal decided in favor of the State Board on every issue they appealed, the December 24, 2002, decision was not certified for publication at that time.

On August 14, 2003, the Court of Appeal of the State of California, Second Appellate District, Division Three, certified its December 24, 2002, opinion for partial publication. The importance of the August 14, 2003, decision is that the outcome of the *City of Burbank v. State Water Resources Control Board* case could then be cited. The City subsequently filed a petition for review with the California Supreme Court.

On November 19, 2003, the Supreme Court granted the petition for review filed by the Cities of Burbank and Los Angeles. The opening brief on the merits was filed December 19, 2003.

On April 4, 2005, the California Supreme Court issued its decision, affirming the judgement of the Court of Appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater.

Ordinarily the Court's decision would become final 30 days after issuance (i.e., it would have become final on May 4, 2005); however, both the water boards and the cities filed petitions for rehearing. The Supreme court reviewed the petitions for rehearing and remanded one remaining issue back to the trial court for resolution. The trial court was required to determine whether or not the permit restrictions were "more stringent" than required by federal law.

On June 28, 2006, the Superior Court judge signed the statement of decision, which found that the following constituents had numeric effluent limitations more stringent than required to meet the federal law existing at the time that the Regional Board adopted the NPDES permit: Bis(2-ethylhexyl)phthalate, Cadmium, Chromium VI, 1,2-dichloroethane, Ethylbenzene, Lead, Selenium, Tetrachloroethylene, Toluene, and Toxaphene. It was also ordered that the contested effluent limits contained in Order No. 98-052 be vacated; that the respondents file a return (a revised NPDES permit) with the court by December 31, 2006; and that the stay of contested effluent limitations remain in effect until the return is served and filed by the Respondents with the Court.

FACILITY AND TREATMENT PROCESS DESCRIPTION

BURBANK WATER RECLAMATION PLANT:

5. The City owns the Burbank WRP and contracts with United Water Services to operate the Burbank WRP, a tertiary wastewater treatment plant located at 740 North Lake Street, Burbank, California. Effective June 15, 2000, the street address changed from 2 West Chestnut Street to 740 North Lake Street. The reason for the change is that the Chestnut Street entrance to the plant was vacated and replaced with the Lake Street entrance. The Burbank WRP has an average dry weather flow design capacity of 9.0 million gallons per day (MGD) with a peaking factor of 2 MGD, and only discharged an average of 5.8 MGD from the WRP (in the year 2005). However, with the completion of the new flow equalization basin project and related upgrades, the design capacity will increase to 12.5 MGD.

6. The Burbank WRP is part of the City of Los Angeles' integrated network of facilities, known as the North Outfall Sewer (NOS), which includes four treatment plants. The upstream treatment plants (Tillman WRP, Glendale WRP, and Burbank WRP) discharge solids to the Hyperion Treatment Plant. This system also allows biosolids, solids, and excess flows to be diverted from the upstream plants to the Hyperion Plant for treatment and disposal. Figure 1 shows the vicinity map for the Burbank WRP.

7. The Burbank WRP serves a population of approximately 100,000 people. Flow to the plant consists of domestic, commercial and industrial wastewater. For fiscal year 2005, industrial wastewater represented less than 10% of the total flow to the plant. Discharges to the collection system from industry include discharges from the following significant industrial user categories: metal finishing (40 CFR Part 433), electroplating (40 CFR Part 413), nonferrous metal forming and metal powder (40 CFR Part 471), plastic molding and forming (40 CFR Part 463), rubber manufacturing (40 CFR Part